

CERTIFIED FOR PARTIAL PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

----

JERRY I ANOLIK,  
  
Plaintiff and Appellant,  
  
v.  
  
EMC MORTGAGE CORP. et al.,  
  
Defendants and Respondents.

C044201

(Super. Ct. No.  
00AS06473)

ORDER MODIFYING OPINION  
AND DENYING REHEARING  
[NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on April 29, 2005, be modified as follows:

1. The asterisk footnote on page 1 is deleted and the following paragraph is inserted in its place:

Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts I and III of the Discussion.

2. On page 21, the first full paragraph, beginning "Anolik argues," is deleted and the following paragraph is inserted in its place:

Anolik argues that under section 2954, "[t]he payment of a single tax bill does not authorize a lender to establish an involuntary escrow impound account." We agree; however, here EMC paid two of Anolik's tax bills. In October 1999, EMC paid part of Anolik's 1998-1999 property taxes, and in December 1999 EMC paid part of Anolik's 1999-2000 taxes. Because he fails to acknowledge EMC's payment of two of his tax bills, Anolik has failed to establish that section 2954 barred EMC from forcing an impound account on him.

3. On page 22, before the first full paragraph, beginning "It follows," the following paragraphs are inserted:

The question remains whether, under the terms of the Note and the Deed of Trust, EMC had the contractual right to force an impound account on Anolik against his will because of his failure to make tax payments on the property. EMC contends that authority can be found in paragraph 2 of the Deed of Trust, which provides that "Lender may, at any time, collect and hold Funds . . . ." According to EMC, "'Funds' is defined to include yearly taxes, which may attain priority over the Deed of Trust." Thus, in EMC's view, this part of the Deed of Trust authorized it to establish, at any time, an impound account for the payment of annual property taxes, regardless of whether Anolik consented to such an account.

We cannot agree. In context, the portion of the Deed of Trust on which EMC relies provides as follows: "Subject to applicable law or to a written waiver by Lender, Borrower shall pay to Lender on the day monthly payments are due under the Note, until the Note is paid in full, a sum ('Funds') for: (a) yearly taxes and assessments which may attain priority over this Security Instrument as a lien on the Property . . . . These items are called 'Escrow Items.' Lender may, at any time, collect and hold Funds in an amount not to exceed the maximum amount a lender for a federally related mortgage loan may require for Borrower's escrow account under the Real Estate Settlement Procedures Act of 1974 as amended from time to time, 12 U.S.C. Section 2601 et seq. ('RESPA'), unless another law that applies to the Funds sets a lesser amount. If so, Lender may, at any time, collect and hold Funds in an amount not to exceed the lesser amount. Lender may estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with applicable law."

Nothing in the foregoing paragraph authorized EMC to *force* an impound account on Anolik for the nonpayment of property taxes. In context, the language on which EMC relies -- "Lender may, at any time, collect and hold Funds" -- is part of a sentence

describing the *amount* of escrow funds the lender can collect and hold. That language does not authorize the lender to unilaterally create an impound account, where one has not existed because the borrower has failed to pay taxes on the property.

Under the Deed of Trust, EMC was entitled to pay Anolik's property taxes if he failed to do so. With respect to the recovery of such advances, however, the Deed of Trust provided: "Any amounts disbursed by Lender . . . shall become additional debt of Borrower secured by this Security Instrument. Unless Borrower and Lender agree to other terms of payment, these amounts shall bear interest from the date of disbursement at the Note rate and shall be payable, with interest, upon notice from the Lender to Borrower requesting payment." Thus, the Deed of Trust provided that, in the absence of an agreement to the contrary, any property taxes advanced by EMC were to be payable, with interest, upon notice from EMC to Anolik requesting payment of those advances. No such notice was tendered here. More importantly, there was no agreement between EMC and Anolik to allow EMC to recover those advances through an impound account, rather than through a demand for immediate payment.

4. Footnote 9 on page 22 is deleted.

5. On page 25, the first sentence in the first full paragraph is deleted and the following paragraph is inserted in its place:

The fatal flaw in that argument is this: The issue before us is not simply whether Anolik was in default under the loan; he admittedly was, because he failed to make the December 1998 monthly installment payment and failed to pay some of his property taxes.

6. On page 32, at the end of the first partial sentence on the page, the phrase "the taxes due in October 1999" is deleted and the following phrase is inserted in its place: "some of the property taxes."

There is no change in the judgment.

Respondent's petition for rehearing is denied.

BY THE COURT:

MORRISON, Acting P.J.

HULL, J.

ROBIE, J.